***United States Court of Appeals***

***for the Second Circuit***

# BRIEF FOR APPELLEE

# 77-2012

*To be argued by*
FRANK H. SANTORO

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 77-2012**

JOHN P. HAZEL,

*Appellant,*

—v.—

NORMAN CARLSON, Director Bureau of Prisons; GEORGE C. WILKINSON, Warden, Federal Correctional Institution, Danbury, Connecticut,

*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

## BRIEF FOR THE APPELLEE

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

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—v.—

NORMAN CARLSON, Director Bureau of Prisons; GEORGE C. WILKINSON, Warden, Federal Correctional Institution, Danbury, Connecticut,

*Appellee.*

## BRIEF FOR THE APPELLEE

### Statement of the Issue

Does the proposed transfer of the Appellant, Mr. Hazel, from Danbury violate any rights accruing to him by virtue of his sentence under the Narcotic Addict Rehabilitation Act (N. A. R. A.).

### Statement of the Case

By order filed on September 20, 1976, the United States District Court for the District of Connecticut (J. Newman) required the Government to respond to a Habeas Corpus Petition previously submitted by Mr. Hazel, an inmate at the Federal Correctional Institution at Danbury, Connecticut. (Appendix—C). Mr. Hazel was

seeking to prevent a transfer to the Federal Penitentiary in Lewisburg, Pennsylvania. The Government responded on October 4, 1976, taking the position that the transfer in question was a valid exercise of administrative discretion and that no vested rights were disturbed thereby. (Appendix—D). The Court denied the requested relief in a Memorandum of Decision filed October 21, 1976. (Appendix—B). This appeal followed. Pursuant to Rule 23 of the Federal Rules of Appellate Procedure, Mr. Hazel is being retained at Danbury pending the outcome.

## Statement of the Facts

On July 1, 1972 Mr. Hazel was sentenced to the custody of the Attorney General to serve a sentence not to exceed ten years pursuant to Title II of the Narcotic Addict Rehabilitation Act (18 U.S.C. Section 4251 *et seq*). On April 11, 1975 he was paroled but subsequently violated his parole and was returned to Danbury to resume his N. A. R. A. sentence. On April 21, 1976, he was sentenced by the Superior Court of the District of Columbia (J. Murphy) on a grand larceny charge to a term of two to eight years to run consecutively with his N. A. R. A. sentence. Judge Murphy recommended that this sentence be served at Danbury. With approximately six years left on his N. A. R. A. commitment, he faces a possible total of fourteen years in confinement.

Several months after his consecutive sentence, the Bureau of Prisons notified Mr. Hazel of an intention to transfer him to the Federal Penitentiary at Lewisburg. The reason for the transfer was to maintain Danbury's character as a correctional institution for adults who are serving sentences of five years or less and not regarded as assaultive, who do not have serious prior records, and

who are not as Security Risks. This policy is expressed in Bureau of Prisons Policy Statement 7300. 13 E dated June 16, 1975. (Appendix—D). The petition for Habeas Corpus and subsequent judicial proceedings resulted.[1]

## ARGUMENT

### I.

### Summary

Mr. Hazel has taken the erroneous position that his N. A. R. A. sentence gives him the right to consider Danbury his legal home. To the extent that he may have any right to treatment under N. A. R. A., that right is flexible and qualified. It is particularly subject to qualification by virtue of his subsequent conviction of a felony and receipt of a substantial consecutive sentence, a contingency not generally contemplated by N. A. R. A.'s aftercare provisions. His transfer, moreover, does not give rise to an equal protection claim as there is a highly rational basis for changing his status and no "quid pro quo" allegedly owed him by the Government has been violated in the process. Finally, the broad power of the Attorney General to transfer prisoners has been validly exercised in this case, and, far from being an abuse of discretion, it is necessary to preserve the integrity of the system and the rehabilitative needs of other more deserving inmates.

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[1] These facts are all recited in the District Court's opinion (Appendix — B) as well as the other moving papers (Appendix — C and D).

## II.

## A N.A.R.A. Sentence Does Not Confer An Indefeasible Right To Treatment Of A Particular Kind At A Particular Place.

### A) The "Right To Treatment" under N.A.R.A. is flexible and qualified.

The Congressional passage of the Narcotic Addict Rehabilitation Act in 1966 was a reaction to increased awareness of the drug problem coupled with a realization that the older and highly inflexible punitive provisions of the law were not working properly. The legislative history reflects an awareness that the problem of addiction was at least partially medical in nature and that "curing" an addict might render continued punishment for his crimes less necessary.[2] The approach was a balanced one, however. Congress was aware not only that certain people may not be amenable to treatment but that the method of treatment itself was a highly inexact science subject to a wide variety of modalities often of an experimental nature. The Congressional balancing act in the statute is perhaps best explained in the leading Supreme Court case which discussed the issue, *Marshall* v. *United States*, 414 U.S. 417 (1973) at 423-430. The

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[2] The legislative history of the Act is contained in the following documents: HR. Rep. No. 1486 (89th Cong., 2d Sess., 1966); Cong. Rep. No. 2316 (89th Cong, 2d Sess. 1966) (the former two documents being contained in 1966 U.S. Code Cong. and Admin. News, pp. 4245 et seq.); S. Rep. No. 1667, 89th Cong., 2d Sess. 1966; Hearings Before Subcommittee Number 2 of the House Committee on the Judiciary, 89th Cong., 1st and 2d Sessions; Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., 112 Cong. Rec. 11795, 11804, 11901, 25418, 25430-32, 28548.

Act itself was tailored to meet a variety of contingent needs. Thus Title I of the Act (28 U.S.C. Section 2901 *et seq.*) became civil commitment in lieu of criminal prosecution. Title III (42 U.S.C. Section 3401 *et seq.*) became a wholly voluntary procedure whereby one not charged with crime could commit himself for treatment. And Title II (18 U.S.C. Section 4251-4255), the relev Title for this case, became commitment *as a* ser One must accordingly be somewhat cautious aga cavalier reference to the entire N. A. R. A. proce.. "civil". This distinction was pointed out by the Court in *Williams* v. *United States*, 327 F. Supp. 986, 988 (S.D.N.Y. 1971) in the following language:

> "Under Title II of the Act, one who has been convicted of .. crime is not asked to elect. This is the distinction between Titles I and II. Under Title 1, commitment is a civil procedure; under Title II, commitment is part of the postconviction procedure."

It is certainly true, however, that Congress intended that a person committed under N. A. R. A. receive treatment of some sort. 18 U.S.C. Section 4253 expressly provides that the Court shall commit eligible offenders to the Attorney General "for treatment." One must be careful about defining the term "treatment" however. There is no further specification of it in the statute and the matter is left to the discretion of the Attorney General. That such discretion should indeed be broad is evidenced by the aforementioned experimental and variegated nature of treatment methods. It is true, moreover, that as Mr. Hazel illustrates in Exhibit E through H of his Appendix [3] the Bureau of Prisons has specifically designated

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[3] These portions of the Appendix were not part of the record below. As they are in the nature of further elucidation, Appellees does not really object to them although the District Court can certainly not be faulted for any specific non-reliance thereon.

five facilities as sites for N. A. R. A. programs and several others (including Lewisburg) for non-N. A. R. A. programs. This discretionary designation, however, does not in any way create, under the statute, a vested right to a specific program. The most that can be said is that a transfer out of a purely "N. A. R. A." unit may involve some diminution of purely N. A. R. A. treatment [4] but it is hardly the sort of classification upon which vested rights are created. Indeed, the Drug Abuse Programs Manual of the Bureau of Prisons itself says (Appendix—F page 1):

> "Since the overall objectives of the 'N. A. R. A.' and 'non-N. A. R. A.' types of programs are identical, 'non-N. A. R. A.' offenders may now be included in what was formerly exclusively a 'N. A. R. A.' program and *vice versa*" (emphasis added).

By pointing to certain differences between the drug programs at Danbury and Lewisburg, Mr. Hazel creates the impression that he has a right to the former. Yet there is nothing in the statute or any cited case to support this proposition. The differences between institutions are numerous and subjective and it is highly speculative to create a "right" on the basis of different program descriptions in manuals. Even assuming, however, that the treatment at Lewisburg may be less advantageous to Mr. Hazel than that at Danbury, a justiciable claim has not been made out.

Mr. Hazel seeks to equate his right to treatment under N. A. R. A. to certain other areas of the law where such right has been given more formal recognition, i.e. the mentally ill and the youthful offender. The analogy,

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[4] That such diminution was self-induced in Mr. Hazel's case will be considered *infra*.

however, simply does not extend that far, either in established precedent or in logic. The mentally ill are afforded a more highly purified "right to treatment" not only because of their well recognized greater need therefor but because they have either not broken the law or, at least, have not done so with *mens rea*. Youth have traditionally been afforded a more protected status because of the *parens patriae* rationale of the law which assumes a greater degree of impressionability and receptivity to change. An adult narcotics offender, however, has not been accorded quite the same status. Indeed, the Court in *Marshall* v. *Parker*, 470 F.2d 34, 38 (9th Cir. 1972) has said ". . . nor can we believe that one who becomes addicted to narcotics has a 'fundamental right' to rehabilitation at public expense." In so saying the Court specifically (in footnote 7, p. 38) distinguished the right to treatment of the insane as established by *Rouse* v. *Cameron*, 373 F.2d 451 (D.C. Cir. 1966), one of the principal cases relied upon by Mr. Hazel. Other cases relied upon by Mr. Hazel and dealing with the right to treatment of youth offenders (*Harvin* v. *United States*, 445 F.2d 675, 680 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 943 (1971); and *United States* v. *Lowery*, 484 F.2d 457 (3rd Cir. 1973) in turn were grounded upon the statutory prescription of 18 U.S.C. Section 5011, a right to treatment provision much more affirmative and specific than anything contained in Title II of N. A. R. A.

In short, if there is any right to treatment at all under N. A. R. A. it is not of the same specific, logical, and venerable status in the law as those areas to which Mr. Hazel seeks to adopt by anology. And it is certainly not specific to the point of allowing him to elect in which institution he will remain. Not only is there no authority in direct support of his position but there is some against it. Thus the Court in *Smith* v. *Schneckloth*, 414 F.2d 680

(9th Cir. 1969) held that an allegation of failure to provide medical or vocational treatment to a state inmate narcotics addict did not state a claim upon which relief could be granted. The Court in *Holland* v. *Ciccone*, 386 F.2d 825 (8th Cir. 1967, *reh. den.* 1968) held the administrative determination of the Attorney General to designate the place at which an inmate (who was, among other things, a narcotics addict) should serve his sentence and receive medical treatment, if any was needed, was not subject to review in a habeas corpus proceeding. In *Peek* v. *Ciccone*, 288 F. Supp. 329, 338 (W.D. Mo. 1968) the Court sustained the authority of the Attorney General (rather than the Courts) to make decisions concerning the locus and the mode of medical care. And in *Hartwell* v. *United States*, 353 F. Supp. 354, 361 (D. D. C. 1972), the Court, confronted with a suggestion of "right to treatment under a N. A. R. A. commitment" went on to observe that the petitioner could not "pick and choose treatment programs according to [their] whim and caprice".

Accordingly, it must be concluded that Mr. Hazel's claim of right to treatment is overbroad in the extreme. What he has claimed is a right to *geographic* and *particularized* treatment. Such is simply not the law.

Even if we grant him the point for the sake of argument, however, there is another problem—a problem posed by his intervening conduct. He himself recognizes this problem but asserts (on p. 14 of his brief) that none of his rights were lost because of his parole violation because the framers of N. A. R. A. were aware that repeated treatment might be necessary before an addict would be cured. This amounts to a virtual creation of a N. A. R. A. *carte blanche* to do whatever one wants and not to be affected. The framers were also engaged in a weigh-

ing of numerous considerations and recognized that a person may reach a point where "treatment" does no good or at least that one's status could be adjusted on the basis of response thereto. As the Court held in *King* v. *Norton*, 336 F. Supp. 255, 257 (D. Conn. 1972):

> Petitioner contends that his sentence under the Narcotic Addict Rehabilitation Act limits his confinement to federal institutions with rehabilitation facilities for narcotic addicts, which are absent at Lewisburg. However, the legislative history of Section 4253 of the Act makes clear that where the prisoner does not respond successfully to the rehabilitation program, ordinary incarceration is contemplated. Section 4253 ". . . provides a lengthy period of sentence for those recalcitrant offenders who do not respond to treatment." U.S. Code Cong. & Admin. News, 89th Cong., 2d Sess., at p. 4252 (1966).

No other reading of N. A. R. A. is rationally possible. Otherwise, an inmate would be able to engage in all sorts of egregious conduct, (whether in confinement or on parole), blame his narcotics addiction, and hold out the contention that he has a right to be back at square one as if nothing had happened because of his "right to treatment." It is clear from the record (Parole Commission Notice of Action filed with Mr. Hazel's moving papers and included as part of Exhibit C in the Appendix) that Mr. Hazel committed a new crime while on parole.[5] Even if this crime were a direct result of his addiction, he cannot complain of at least some adjustment to his status.

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[5] Although not absolutely clear, the most reasonable inference is that this "new crime" is the grand larceny from which he received the consecutive sentence from Judge Murphy.

A N.A.R.A. sentence is not all carrot; it also contains some stick.

### B) The Claimed Right is Inconsistent With a Consecutive Regular Sentence.

The normal contemplation of a N. A. R. A. sentence is that a person will gradually "get off" drugs by utilizing the appropriate rehabilitative facilities in confinement followed by carefully supervised aftercare in the community. It envisions a winding down process free of the complications of subsequent criminal sentences. It is recognized, of course, that an addict's "cure" may not be without an occasional relapse. But for a N. A. R. A. sentence to work properly, it cannot be followed by a consecutive sentence of any substance. The inconsistency is inherent.

This inconsistency was recognized by the Congress when it included the following exclusion from eligibility for a N.A.R.A. sentence in 18 U.S.C. Section 4251(f)(3):

> An offender against whom there is pending a prior charge of a felony which has not been finally determined or who is on probation or whose sentence following conviction on such a charge, including any time on parole or mandatory release, has not been fully served: Provided, That an offender on probation, parole, or mandatory release shall be included if the authority authorized to require his return to custody consents to his commitment.
>
> (for the sake of convenience, this will subsequently be referred to as the (f)(3) exclusion).

Once again the Congressional weighing of priorities becomes plain. There was no point in affording N.A.R.A.

treatment to someone who would not be able to benefit from it because of other time to be served.[6]

It is clear that when Mr. Hazel returned to Danbury after being free on parole that, by virtue of his consecutive D. C. sentence, he would have been ineligible for N.A.R.A. consideration if the matter were to be considered *ab initio*. What is thus to happen to his N.A.R.A. sentence in light of the clear statutory exclusion? Several readings are possible. The first permissible interpretation is that Mr. Hazel has totally lost any rights inherent in his N.A.R.A. sentence by virtue of the occurrence of a condition subsequent resulting in ineligibility. The second reading is that while such rights are not totally lost, they are subject to at least some modification in light of the rationale (if not the express terms) of the exclusion. The third reading (and the one Mr. Hazel would have the Court accept) is that the rationale behind the exclusion means nothing and that his status remains totally unaffected by the new set of circumstances. The Government submits that this latter interpretation is totally unrealistic. It further submits that while the first reading is permissible, the second one is probably the most reasonable way to accommodate the somewhat incongruous coupling of a N.A.R.A. sentence with a consecutive non-N.A.R.A. one. While the theoretical inconsistency can never totally be alleviated, the two sentences can be lumped together with continued (if somewhat modified) treatment and continued (if somewhat modified) ability of the Parole Commission to grant relief at the appropriate time.[7]

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[6] It is common judicial practice, when considering N.A.R.A. treatment for an individual, to give him some time to get his affairs in order by getting rid of other pending cases which would otherwise interfere with his eligibility. See *United States* v. *Williams*, 402 F.2d 940 (4th Cir., 1969).

[7] The Parole Commission, after all, is the agency which decides to release in the purely N.A.R.A. situation. *Williams* v. *United States, supra.*

The proposition that the (f)(3) exclusion is a proper basis for denying or modifying N.A.R.A. relief has found support in several reported cases. In *United States* v. *Taylor*, 485 F.2d 1077 (D.C. Cir., 1973), the Court, in sustaining the Constitutionality of the exclusion, pointed out that an unserved sentence undercuts that kind of immediate commitment contemplated by N.A.R.A. In *United States* v. *Williams*, *supra* the Court discourses at length on the (f)(3) exclusion and points out (at 947) that its rationale was:

> "to bar those for whom expensive treatment would probably be a waste of time and money because of the probability that its efficacy would be destroyed by an *overhanging probable active sentence.* (emphasis added)

Footnote 10 to the above quoted comment in *Williams* goes on to point out that in the legislative history, this proposition was "assumed almost without discussion." Mr. Hazel's D. C. sentence is nothing if not an "overhanging probable active sentence" and for him to argue that his N.A.R.A. sentence cannot be subject to the slightest tampering in light thereof is to ignore the entire purpose of the Act. In the case of *Ida Watson* v. *Federal Parole Board*, 394 F. Supp. 1291 (D. D.C., 1974), a N.A.R.A. sentence was followed by a subsequently imposed non-N.A.R.A. one. In order to facilitate rehabilitative progress on the later, the Court actually ordered the N.A.R.A. parole violators warrant to be withdrawn. While the Watson facts are somewhat the reverse of Hazel's, the case at least shows that the Court was prepared to totally disregard any sacrosanct pretensions of the N.A.R.A. right to treatment.

In summary therefore, the rationale of the (f)(3) exclusion shows that a N.A.R.A. sentence should be subject to modification when warranted by intervening circumstances.

## III.

### The Transfer of a N.A.R.A. Prisoner is Not a Violation of Equal Protection.

Appellant has constructed an interesting argument that his transfer from Danbury creates a deprivation of equal protection under the law guaranteed by the Fifth Amendment to the Constitution. His commitment was for an indeterminate term not to exceed ten years which period may be greater than what he might have gotten under a straight non-N.A.R.A. sentence *Baughman* v. *United States*, 450 F.2d 1217 (8th Cir. 1971); *United States* v. *Watkins*, 330 F. Supp. 792 (D.D.C. 1971), affirmed 475 F.2d 419 (D.C. Cir. 1973); *United States* v. *Curtis*, 523 F.2d 1134 (D.C. Cir. 1975); *United States* v. *Bishop*, 487 F.2d 631 (1st Cir. 1973).

The argument goes that a certain *quid pro quo* has been transferred in the process and that he should be entitled to receive full N.A.R.A. treatment (meaning, presumably in this case, the right to stay at Danbury) in return.

This somewhat novel argument, however, contains a number of unsupported assumptions as well as misconceptions of the length and nature of his N. A. R. A. sentence. First of all, there is no evidence whatsoever to suggest that the sentencing judge would have given Mr. Hazel less than ten years had he elected a straight non-N. A. R. A. sentence. Secondly, the notion that Mr. Hazel may somehow have earned any *quid pro quo* as a result of something he has either given up or lost belies the nature of the N. A. R. A sentencing process. If he is found to be an eligible offender (and it is not up to him to decide to take the eligibility test), the Court *must*

sentence him to a N. A. R. A. sentence even if he does not want it. *Watson* v. *United States*, 408 F.2d 1290 (D.C. Cir. 1969); *United States* v. *Carroll*, 436 F.2d 272, 274 (D.C. Cir. 1970); *Williams* v. *United States*, *supra*.) If this involves any loss, it is a loss built into the statute itself and not the result of a discretionary act of the judge. As a practical matter, it is not generally any necessary loss of time. Although the maximum time is ten years, the minimum is six months with the general expectation of getting out long before the ten year period is up. (Mr. Hazel originally made it in less than three). To construct from this the proposition that a N. A. R. A. sentence is "longer" than what is otherwise available is pure speculation. The argument also assumes that a specific N. A. R. A. "right" involved is the right to remain at Danbury. Even if it were assumed that any *quid pro quo* were involved, it is not necessarily the specific right claimed. In an earlier part of this brief we have pointed out that the concept of N. A. R. A. rights is hardly so restrictive. Actually, appellant's *quod pro quo* terminology appears to have been taken from two cases which dealt with youth offenders, *Carter* v. *United States*, 306 F.2d 283 (D.C. Cir. 1962) and *United States ex rel. Sero* v. *Preiser*, 506 F.2d 1115 (2d Cir. 1974), *cert. denied*, 95 S. Ct. 1587 (1975). The cases are distinguishable, however, not only because they deal with a class which has been awarded a wholly different status from that of Mr. Hazel (as has been more fully explained *supra*) but they do not take into consideration a change in circumstances brought about by the intervening conduct of the sentenced party himself.

Actually the most appropriate reasoning to use in considering any equal protection claim is that used by the major cases interpreting N. A. R. A. and sustaining its exclusion provisions. *United States* v. *Marshall*, *supra* (the two felony exclusion); *Marshall* v. *Parker*, [illegible]70 F.2d

34 (9th Cir. 1972) (same); *United States* v. *Fersner*, 465 F.2d 605 (D.C. Cir. 1972) (the violent crime exclusion) and *United States* v. *Taylor*, 485 F.2d 1077 (D.C. Cir. 1973) (the (f)(3) exclusion). All of these cases reason that there was a rational basis for the statutory exclusions in question. In particular, *Marshall* v. *Parker*, after finding that there is no inherent right to treatment under N. A. R. A. and that there is no suspect class, goes on to note on p. 38 that the "normal" standard is applicable i.e. that a reasonable classification of persons may be made and each class dealt with differently if there is some relevance to the basic purpose for which the classification is made. This sort of traditional equal protection reasoning should be applied to Mr. Hazel's claim. Is it reasonably relevant to the joint purposes of the combined N. A. R. A. and non-N.A.R.A. sentences when considered in light of Bureau Policy for the preservation of a certain character at Danbury to transfer Mr. Hazel to Lewisburg where another drug program is available? The Government submits that the answer is unequivocally affirmative.

## IV.

### The Decision to Transfer Mr. Hazel was a Proper Exercise of Discretion.

As a preliminary matter, it should be noted that Mr. Hazel never presented his case against transfer to the prison administrative authorities. He went directly to the Court. In his rebuttal to the Government's Answer (Appendix C), he argues that it would have been fruitless. This is not necessarily so. A NARA transfer involves a certain degree of administrative decision—making even absent an inmate protest. As the affidavit supplied with the Government's Answer (Appendix D)

indicates "Prior to transfer of NARA cases, clearance must be obtained from regional office". Mr. Hazel may not have won his point. But to argue that its mere presentation was fruitless is to circumvent that body of law which holds that habeas corpus relief is premature in the absence of prior exhaustion of administrative remedies. Bureau of Prisons Policy Statement 2001.6A (Appendix D); *Kochie* v. *Norton*, 343 F. Supp. 956 (D. Conn. 1972).

In any event, the recent Supreme Court cases of *Meachum* v. *Fano*, 96 S. Ct. 2532 (1976) and *Montanye* v. *Haymes*, 96 S. Ct. 2543 (1970) have made it crystal clear that the authority of prison administrators to transfer inmates is virtually plenary in the absence of the deprivation of a fundamental right. The fact that life in one prison is more disagreeable than another is not a matter of Constitutional magnitude. For the same reason that a transfer was held not to trigger the due process mechanism of notice and hearing, so should it not be prevented by the bootstrapping and somewhat tautological assertion of an inherent right against transfer per se. We have demonstrated previously that any right to treatment under NARA which Mr. Hazel may retain does not entitle him to a geographically specific place of confinement. As the Supreme Court commented in *Meachum*:

> "The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in *any* of its prisons."
>
> (The emphasis is the Supreme Court's)

and later,

> "A prisoner's past and anticipated future behavior will very likely be taken into account in selecting a prison in which he will be initially incarcerated or to which he will be transferred to best serve the State's penological goals."

In this case the transfer was premised on a specific policy which precludes inmates with long sentences remaining at Danbury. As such, it reflects an adjustment in Mr. Hazel's status directly resulting not only from his parole violation, but his conviction of a serious crime while on parole. Assuming that the Bureau of Prisons has to give a reason, this one is certainly sufficient. While it may be true, as Mr. Hazel suggests, that the designation of a place of confinement is subject to review for abuse of discretion. *Rodriguez Sandoval* v. *United States*, 409 F.2d 529, 532 (1st Cir. 1969), *cert. denied*, 414 U.S. 864 (1973); *United States ex rel. Gereau* v. *Henderson*, 526 F.2d 889, 897 (5th Cir. 1976); *Ange* v. *Paderick*, 521 F.2d 1066, 1068 (4th Cir. 1975); *Lawrence* v. *Willingham*, 373 F.2d 731 (10th Cir. 1967),[8] there is no such abuse here. Judge Newman expressly so found and the evidence in support thereof is beyond cavil.

The fact that Judge Murphy recommended that his consecutive sentence be served at Danbury is not of binding significance. 18 U.S.C. § 4082(a) provides that a person convicted of a federal offense shall be committed "to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served". It has been clearly held that recommendations of sentencing judges are not controlling, *Hash* v. *Henderson*, 385 F.2d 475 (8th Cir. 1967); *United States* v. *McIntyre*, 271 F. Supp. 991 (S.D.N.Y. 1967) *affirmed* 396 F.2d 859 (2d Cir. 1968), *cert. denied*, 393 U.S. 1054; *Thogmartin* v. *Moseley*, 313 F. Supp. 158 (D.C. Kan. 1970) *affirmed* 430 F.2d 1178, *cert. denied*, 400 U.S. 910 (1970); *United States* v. *Janiec*,

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[8] It is interesting to note that of these four cases cited, only one found an actual abuse of discretion and another referred to the traditional judicial "hands off" attitude in such matters.

505 F.2d 983 (3rd Cir. 1974), *cert. denied*, 420 U.S. 948 (1975).

The proposed transfer of Mr. Hazel from Danbury is thus free of legal obstacles and should be permitted by this Court.

## V.

## CONCLUSION

The Appellant, Mr. Hazel wishes to remain at Danbury under a claim of right to treatment under the Narcotic Addict Rehabilitation Act. But he has excessively magnified and particularized his claim of right. He has also neglected any consideration of correlative duties. One must be very careful of overly broad assertions of legal rights. The American positivist W.N. Hohfeld has pointed out in *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (ed. Cook, Yale University Press, 1923, Ch. 1) that:

> "One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to 'rights' and 'duties', and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests . . . in any closely reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression. . . . The strictly legal relations are, after all, *sui generis;* and thus it is that attempts at formal definition are always unsatisfactory . . ."

The real question in the end in this case is whether Mr. Hazel[illegible] remain in his originally assigned spot at Danb[illegible] after having violated his parole and getting convicted of another crime when an intervening prison policy inuring to the benefit of other inmates is involved. It is the position of the Government that he should not and it is respectfully submitted that this Court should so find.

Respectfully submitted,

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

No. 77-2012

JOHN P. HAZEL,
APPELLANT

v.

NORMAN CARLSON - GEORGE C. WILKINSON,
APPELLEE

## AFFIDAVIT OF SERVICE BY MAIL

Patricia D. O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street, New York, New York 10023

That on the 7th day of April, 1977 deponent served the within Brief upon David J. Gottlieb, Esq., The Legal Aid Society, Federal Defender Services Unit, 509 United States Courthouse-Foley Square, New York, New York 10007

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Patricia D. O'Hara

Sworn to before me,

This 7th day of April, 1977

Edward A. Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1979